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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1971.

NO. .....

J. W. HARGROVE, PLAINTIFF-APPELLANT,

-vs-

C. L. NEWSOME, et al., DEFENDANT-APPELLEES.

On Appeal from the Supreme Court of Tennessee

JURISDICTIONAL STATEMENT

J. W. Hargrove, the appellant here and the plaintiff below, respectfully prays that this Court note probable jurisdiction of its appeal seeking review of the judgment of the Supreme Court of Tennessee entered in this case on September 7, 1971.

OPINION BELOW

The initial and supplementary opinions of the Supreme Court of Tennessee are reported at 470 S.W.2d 348, but are as yet unreported in the official reports of the Supreme Court of Tennessee. The opinion denying the plaintiff's petition for rehearing is unpublished. All three opinions are set forth in the Appendix.

This proceeding originated as an action in the Circuit Court for Davidson County, Tennessee. It was a products liability action in which the plaintiff, the appellant here, sought to recover for personal injuries received from a defective mechanical dock. The trial court dismissed the action as barred by the statute of limitations on July 17, 1970. On appeal this dismissal was affirmed on June 7, 1971. On September 7, 1971, a petition for rehearing was denied and judgment entered by the Supreme Court of Tennessee. Timely notice of appeal to this Court was filed in the Supreme Court of Tennessee on December 2, 1971.

The Supreme Court of Tennessee entered its judgment on September 7, 1971. Its initial and supplemental opinions had been filed on June 7, 1971 but because the plaintiff had immediately petitioned the state court for a rehearing, the judgment was entered at that time but did not become final until disposition of the rehearing petition. The petition for rehearing was denied, and judgment was entered on September 7, 1971.

Jurisdiction of this Court is invoked pursuant to section 1257(2) of the Judicial Code [28 U.S.C. § 1257(2)] this being an appeal which draws into question the validity of T.C.A. § 28-304, on the ground that it is repugnant to the Constitution of the United States.

As the Supreme Court of Tennessee applied TENN. CODE ANN. § 28-304, the general statute of limitations, to bar an

action before injury had occurred in spite of the appellant's assertion that such application was unconstitutional, this matter is appropriately brought to this Court by appeal. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

Nor is there an adequate state ground. The Tennessee Supreme Court cited its rule, TENN.SUP.CT.R. 14(4), in overruling the plaintiff's constitutional arguments. Certainly this is a procedural state ground as opposed to a substantive state ground so that the jurisdiction of this Court is not brought into question. Henry v. Mississippi, 379 U.S. 443 (1965). Evenso, this state procedural rule does not on its face apply to provide state grounds for denying the plaintiff's constitutional claim and no reported case has been found where the Tennessee appellate courts in overruling a demurrer applied the cited rule or the analogous rule of the state Court of Appeals, TENN. CT. APP. R. 12(4). At best, the Tennessee Supreme Court's dismissal was discretionary; at worst, it was novel. In either case, the reference to rule 14(4) is not an adequate state ground. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review.") and Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) ("[A] rule, more properly deemed discretionary than jurisdictional, does not bar review."). Moreover, the federal question was timely. Williams v. Georgia, 349 U.S. 375 (1955); Sullivan v. Little Hunting Park, supra.

In the event that the Court does not consider appeal the proper mode of review, the appellant requests that the

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upon as a petition for writ of certiorari pursuant to Section 2103 of the Judicial Code [28 U.S.C. § 2103].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the fourteenth amendment to the Constitution of the United States.

This case also involves TENN. CODE ANN. § 28-304, as it existed prior to May 16, 1969, which states:

> Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and statutory penalties shall be commenced within one (1) year after cause of action accrued.
>
> TENN. CODE ANN. § 28-304.

QUESTIONS PRESENTED

This appeal deals with the constitutionality of Tennessee's statute of limitations as applied to the present case, to bar the plaintiff's action before he was injured. In Jackson v. General Motors Corp., 223 Tenn. 12, 441 S.W.2d 482, cert. denied, 396 U.S. 942 (1969) and its progeny, the state Supreme Court has held that in products liability actions, the one-year limitation for personal injuries, TENN. CODE ANN. § 28-304, runs from the time of sale, not from the time of injury. In the present case the state Supreme Court disregarded prior decisions of intermediate state court and the federal

diversity courts to hold that Jackson's time-of-sale principle applied.

The present case is a products liability action arising out of injuries received by the plaintiff in an industrial accident caused by a defective mechanical dock. Because the dock had been purchased over fourteen months before the accident, the state courts held that Jackson barred suit by the plaintiff over two months before the injury occurred.

Thus, the questions presented are:

1. Whether Tennessee's one-year personal injury limitation running from the time of sale is so short that it denies plaintiffs a reasonable opportunity to be heard and to present claims recognized by state law to be valid, thus violating the due process clause;

2. Whether the principle Jackson decision singles out a class for denial to them of access to the courts without the justification of a compelling governmental interest in contravention of equal protection of the laws guaranteed by the fourteenth amendment.

STATEMENT OF THE CASE

The Facts.

This is a products liability action for $60,000 for personal injuries suffered by the plaintiff, J. W. Hargrove, in an industrial accident on September 22, 1967. The accident

was caused by a defect in a mechanical dock purchased by the plaintiff's employer, the Schroeder Division of Scoville Manufactoring Company located in Dickson, Tennessee, from defendant, W. L. Newsome, doing business as Materials Handling Service. The date of sale was July 8, 1966. The ramp was manufactured by defendant, Kelley Company, and distributed through Newsome.

The accident occurred when the plaintiff-employee was operating a mobile fork lift in the course of his employment. He drove the fork lift into the mechanical dock. A defect in the functioning of the dock caused the dock to incline at a steep angle throwing the fork lift, with the plaintiff on it, backwards to the ground level four feet below. The lift rolled over in mid-air, landing on top of the plaintiff and severely injuring him.

Trial Court Proceedings.

On September 20, 1969, the plaintiff filed suit in circuit court against these defendants, the dock manufacturer and its selling agent, alleging diversity and seeking damages for his injuries. At the time of filing, two years and two months had elapsed since the sale of the defective products. The injury occurred within one year of the filing.

The declaration alleged negligence, strict liability, and breach of warranty. The defendants demurred, contending the action was barred by Tennessee's general personal injury limitation, TENN. CODE ANN. § 28-304, and that the warranty counts should be dismissed for lack of privity of contract.

The circuit court held that because more than one year had elapsed prior to the initial filing, Jackson required the dismissal of the negligence and strict liability counts; lack of privity barred the warranty count.

Proceedings in the State Supreme Court.

On appeal to the Supreme Court of Tennessee the plaintiff argued, in addition to advocating the abolition of the privity requirement in warranty actions, that the limitation period could not begin to run until some injury "however slight" was incurred by the plaintiff. In the Tennessee Court's initial opinion the limitations issue, even though raised, was ignored; the Court simply reversed its trend toward the abolition of the no-privity defense.

In a supplemental opinion the state Supreme Court overruled the decisions of its intermediate court in Harts v. Tennessee Liquified Gas Corp., 2 Tenn. App. Bull. 207 (Ct. App. 1971); and the federal diversity courts in Hodge v. Service Mach. Co., 438 F.2d 376 (6th Cir. 1970); Vason v. Nickey, 438 F.2d 242 (6th Cir. 1970).

Hargrove immediately petitioned for a rehearing raising two new authorities: the state workman's compensation limitation, and the fourteenth amendment of the federal Constitution. On September 7, the state court denied the rehearing and entered judgment, stating that TENN. SUP. CT. R. 14(4) justified denial of the additional questions. From this judgment the plaintiff appeals to this Court.

WHY THE QUESTIONS ARE SUBSTANTIAL

This case arises out of injuries suffered by J. W. Hargrove because of a defect in a fourteen-month-old machine. The district court applying Tennessee's general personal-injury limitation held that the action became time-barred two months before the injury occurred. Hargrove has been denied any right to present his claim to the courts even though he has a valid right of action.

A limitation rule which bars recovery for injuries before they occur is manifestly unfair and irrational. It brings to mind the brand of justice dispensed by Lewis Carroll's Queen of Hearts. Judge Jerome Frank, dissenting in Dincher v. Marlin Firearms Co., 198 F.2d 821 (2d Cir. 1952) pointed out the anomaly of a pre-injury time-bar.

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff . . .
>
> As the Connecticut Supreme Court has said, the policy behind a limitations statute is that of penalizing one who "sleep[s] upon his rights." But no student of such legal somnolence has ever explained how a man can sleep on a right he does not have.
>
> 198 F.2d at 823.

J. W. Hargrove did not sleep on his rights. He did not delay unnecessarily in bringing his action. Even under

Tennessee law, his rights are still alive. The law of Tennessee still recognizes Hargrove's right of action provided he can find a forum to present his claim. The most rudimentary notion of justice demands that Tennessee allow Hargrove a meaningful and appropriate hearing for a recognized claim. This notion is embedded in the federal Constitution.

The question is whether the courts of Tennessee can, while recognizing an established right of action, close their doors to hear such claims before the transaction creating the action transpires. What more fundamental right can there be than the right to bring a claim into the courts for determination on the merits? Without that privilege all other legal rights become useless gestures, judicial principles devolve into empty axioms, and legal thought deteriorates into a meaningless metaphysics without connection with the real world.

The issue is not whether Tennessee law recognizes products liability torts. It does. The issue is the right of access to the courts, the right to a hearing on the merits. This right is fundamental to the due process of law guaranteed by the federal Constitution.

PART ONE: THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. STATE LAW BACKGROUND: THE JACKSON RULE REQUIRES PRODUCTS LIABILITY CLAIMS TO BE FILED WITHIN ONE YEAR OF SALE EVEN THOUGH THE INJURIES COMPLAINED OF OFTEN OCCUR AFTER THAT TIME.

Jackson v. General Motors Corp., 223 Tenn. 12, 441 S.W.2d 482, cert. denied, 396 U.S. 942 (1969), is at the

core of this lawsuit. It was a products liability action for personal injuries which allegedly occurred when a defect in the brakes of the Jackson's car caused it to suddenly roll backward down their sloping driveway, striking and injuring Mrs. Jackson. The car, purchased before the Uniform Commercial Code became effective in 1962, was two and a half years old at the time of the accident.

Subsequently the Jacksons sued for these injuries, pleading negligence, warranties, and misrepresentation. The Tennessee Supreme Court, however, dismissed the action. All counts were barred by the general personal-injury limitation, TENN. CODE ANN. § 28-304, because the Tennessee Court held that in products liability actions the limitation period began running at the time of sale, not the time of injury.

The Tennessee Court has followed Jackson in a subsequent line of cases. In Layman v. Keller Ladders, Inc., 455 S.W.2d 594 (Tenn. 1970), the state Supreme Court reaffirmed Jackson's time-of-sale principle in dismissing the plaintiff's negligence and strict tort liability counts. Unlike the product in Jackson, the Layman product was purchased subsequent to the effective date of the Uniform Commercial Code. Because the UCC contains a specific limitation for warranty actions thereunder, the Layman decision allowed the plaintiff to proceed on his warranty count.

In Bates v. Shapard, 461 S.W.2d 946 (Tenn. 1970), handed down the day on which the present case was argued, the Court again denied recovery against the manufacturer of an allegedly

defective automobile on limitations grounds even though the plaintiff, the car owner's girl friend (and by the time of his filing, his wife) had no legal interest in the automobile at the time of the accident. Warranty recovery was allowed against the automobile dealer!

Finally in Flynn v. Camp, 470 S.W.2d 347 (Tenn. 1971), handed down the same day as the present case, the Tennessee Court held that the amendatory act passed by the legislature even before the Jackson decision became final, was ineffective to save an action for a defective product sold before the amendment's effective date.

None of the Jackson line of cases however involved injuries to plaintiffs with no legal remedy at all until their injury until the present case. In this case an employee injured by a defective mechanical dock sought recovery for his injuries. Despite prior indications that it might rule otherwise for UCC products, the state Supreme Court reiterated the privity requirement for warranty actions and refused to allow an employee to maintain an action for injuries suffered in the course of employment from his employer's equipment.

In a supplemental opinion the state Court also refused to accept this Court's holdings in Vason v. Nickey, 438 F.2d 242 (6th Cir. 1970) and in the first appeal in Hodge v. Service Machine Co., 438 F.2d 347 (6th Cir. 1970), in which it was decided that some "legally cognizable damage,"

however slight, was necessary to commence the Jackson limitation.

Finally in its third opinion, an unpublished denial of a rehearing, the state Supreme Court made it clear that for procedural reasons it had not considered the merits of the plaintiff's constitutional arguments.

The Tennessee Supreme Court dismissed the present action by applying Jackson's time-of-sale rule even though the plaintiff incurred no "legally cognizable damage" until he was injured. The state court erred in holding that Jackson v. General Motors and the rule espoused in that case were constitutional: First, the Jackson case denies plaintiffs due process of law by construing a statute of limitations for products liability actions in such a manner that it precludes a reasonable opportunity to present their claims to the courts. Second, it denies them equal protection because it differentiates among claimants in granting fundamental constitutional interest, the right of access to the courts, without the justification of a compelling governmental interest.

II. THE PRINCIPLE OF JACKSON V. GENERAL MOTORS DENIES PLAINTIFFS PROCEDURAL DUE PROCESS BY FAILING TO AFFORD THEM A REASONABLE OPPORTUNITY TO PRESENT VALID CLAIMS.

The due process clause has always required that parties to a lawsuit be afforded a full and reasonable opportunity to present their case to the courts for adjudication. As the Supreme Court stated in Grannis v. Ordean, 234 U.S. 385 (1914),

> The fundamental requisite of due process of law is the opportunity to be heard.
>
> 234 U.S. at 394.

In Commencing the statutory limitation period at the time of sale and in limiting actions to those brought within one year of the time of sale, Jackson denied J. W. Hargrove the right to bring this action because he was hurt fourteen months after the sale. The Jackson limitation is thus unconstitutional.

A. Due Process Requires that Parties be Given a Full and Reasonable Opportunity to Present Claims.

Perhaps the most fundamental right espoused in the phrase "due process of law" is the opportunity of those interested in litigation to make appearance and present facts relevant to the issues to the tribunal charged with adjudication of the interest involved.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) the federal Supreme Court reiterated the requirement of a full opportunity for a hearing in reexamining the constitutionality of the notice provisions of a New York act allowing known defendants in trust distribution actions to be notified of the action by publication. Because the notice provisions of the act did not provide the best opportunity reasonably possible for the trust beneficiaries to make their appearance, it was unconstitutional. The due process clause necessarily implies the reasonable opportunity for a full and fair hearing.

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case.
>
> 339 U.S. at 313.

The Mullane Court thus recognized as a general proposition the following corollary to the due process clause: Every party to litigation must be afforded a reasonable opportunity for a full and fair hearing on their merits.

Due process requires more than a perfunctory hearing; the required hearing must be "meaningful." In Armstrong v. Manzo, 380 U.S. 545 (1965), a child's natural father was not given notice of adoption proceedings whereby he was deprived of the parenthood of his child. The lack of notice was justified under state law by an ex parte finding of nonsupport. When he sought to set aside the adoption decree the trial court held that he had not sustained the burden of proof, a burden which he would not have born at the earlier hearing. The Supreme Court reversed, holding that the shift of the burden was impermissible. Delaying the natural father's opportunity to be heard until the burden had shifted against him was to deny him an "opportunity [to be heard] at a meaningful time and in a meaningful manner." 308 U.S. at 552 (Emphasis added.) Certainly holding that Hargrove must file suit before he is injured is to fail to provide an opportunity for a hearing which is meaningful in time.

Plaintiffs, as well as defendants, are entitled to the constitutionally guaranteed opportunity for a hearing. In Boddie v. Connecticut, supra, 401 U.S. 371, the Court refused to allow Connecticut to charge an indigent prepaid court cost in a divorce action on the ground that such a charge would effectively deny him access to the divorce courts. Admittedly Connecticut might severely limit the available grounds for divorce or perhaps altogether deny it, but Connecticut cannot deny court access to a plaintiff alleging a valid claim.

Finally, Bell v. Burson, 402 U.S. 535 (1971) applied the requirement of an opportunity to be heard in a driver's license suspension proceedings. Even though a driver's license is a mere privilege, not a right, it is an "important interest" subject to procedural due process. The Hearing Corollary requires a determination of fault in suspension proceeding because the federal Court's analysis of state law showed the fault was a material issue.

This Court's holdings in this area ring crystal clear. At the very least, due process requires that a state provide a reasonable opportunity for a hearing "at a meaningful time" before its action can alter any "important interest," whether the interest is the right to drive on public roads, the right to obtain a divorce, or the right to recover damages for personal injuries caused by a defectively manufactured product.

B. The Jackson Rule Does Not Allow Plaintiffs a Hearing on the Material Issues of their Claims.

The limitations rule of Jackson v. General Motors fails to satisfy due process of law because it does not allow plaintiffs a reasonable time within which to present their claims, hence violating the right to a hearing guaranteed by the due process clause. Analysis of state law in the manner followed by this Court in Bell v. Burson, supra, 402 U.S. 535, shows that the present plaintiff was prevented from having any opportunity at all for a hearing on his claim.

The Burson case first analyzed state law to determine which issues are material. The Court then examined the state procedures to determine if the hearing opportunity afforded was "meaningful" and "appropriate."

In the Burson case, this Court analyzed the Georgia license-suspension procedure carefully to determine whether they were sufficient to provide Mr. Burson with an opportunity for a full hearing which was "meaningful" and "appropriate to the nature of the case." The Court concluded Georgia had deprived Mr. Burson due process by refusing to allow him to present evidence that a judgment could not be rendered against him in a proceeding where the only purpose of the proceeding was to secure such judgments. Georgia had no interest in protecting claimants of unrecoverable judgments.

Georgia's primary argument contended that fault and liability was irrelevant to its statutory scheme; hence, a

hearing on the fault issues was unnecessary: But an analysis by the federal Court showed conclusively that Georgia law of accident reparation was fault-oriented.

> Thus, we are not dealing with a no-fault scheme. Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his license, the State may not consistently with due process eliminate consideration of that factor in its prior hearing.
>
> 402 U.S. at 541.

In the present case we are not dealing with a statutory scheme whereby a state grants a right for only a limited time. The state-law scheme allows Hargrove a right of action; it simply denies him a forum within which to bring such action.

After examining state law to determine the material issue, the Burson Court then analyzed the state's procedural mechanics to determine whether the procedural scheme provided a "meaningful" hearing "appropriate to the nature of the case" within the meaning of those criteria as stated in Armstrong v. Manzo, supra, 380 U.S. at 552, and Mullane v. Hanover Bank, supra, 339 U.S. at 313. The Court's conclusion was that the Georgia provision for hearing opportunity failed to meet the due-process standard.

> It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard.
>
> 402 U.S. at 542.

Under Bell v. Burson, due process and its opportunity-for-hearing corollary require that state procedure allow any

person with an "important interest" in litigation be given an opportunity to present any evidence relevant to issues which under state law are material to the determination of the interest. As we shall see, under this test, the Jackson rule fails miserably; without denying the Hargrove's substantive right of action, Jackson v. General Motors, when applied to the present case, completely withdraws from the plaintiff the right to present evidence to establish his claim.

A Burson analysis of the state law shows that, notwithstanding the limitations bar, the plaintiff's claim remains valid. The issues material to the plaintiff's claim remain the same after the limitation as before.

The first step in the Supreme Court's analysis in Bell v. Burson, supra, 402 U.S. 535, is an examination of the state law to ascertain the material elements of the claim.

In the present situation such an examination shows that the elements are the same, both before and after the limitation bars the action, because the Jackson time-bar does not in any way affect the plaintiff's substantive right. Under state law the limitation bars the remedy not the right. The common law has always regarded the question of limitations as affecting only the remedy and not the underlying substantive right. As early as Estes v. Kyle, 19 Tenn. 34 (1938) the Tennessee Court said:

> With regard to the statutes of limitations especially, there can be no doubt ... they are strictly questions

affecting the remedy, and not questions upon the merits.

19 Tenn. at 41.

This statement has been followed by the Tennessee courts in an unbroken line of cases since that time to justify application of local limitations to foreign claims. Barbour v. Erwin, 82 Tenn. 716, 720 (1885); McDaniel v. Mulvihill, 196 Tenn. 41, 44, 263 S.W.2d 75 (1953). See also Kempe v. Bader, 86 Tenn. 189 (1887); Peebles v. Green, 74 Tenn. 471 (1880); Hubbard v. Epps, 68 Tenn. 231 (1877); Gassaway v. Hopkins, 38 Tenn. 583 (1858). Compare RESTATEMENT OF CONFLICTS OF LAW §§ 603, 604 (1934).

In the most recent of these cases, McDaniel v. Mulvihill, 196 Tenn. 41, 236 S.W.2d 75 (1953), an action based on the Mississippi Wrongful Death Act was brought in the Tennessee courts. The Mississippi Death Act provided for no limitation period but instead incorporated that state's general limitation statute which allowed six years within which to bring a death action. The trial court dismissed the case and the Tennessee Court upheld the dismissal on the ground that while Mississippi law established the right of action, the Tennessee limitation law barred the remedy.

Similarly, the limitation bar of the Jackson rule bars the remedy afforded by the Tennessee court, but not the right of action. The plaintiff, without a doubt, is entitled to relief if he is allowed to prove the facts alleged in the complaint. In essence, Tennessee has created a right of action but has denied the plaintiff any reasonable opportunity to enforce that right of action.

Thus even while dismissing Hargrove's action, it is clear that Tennessee law recognizes that Hargrove has a right of action for his products liability injury. Yet under the state limitation law he is precluded from the right to prove his right of action and to obtain a judgment. He is simply barred from any remedy to enforce such right. He is not given the reasonable opportunity to be heard required by procedural due process.

Analysis of the hearing afforded the plaintiff shows that it fails miserably to measure up to the standards of meaningfulness and appropriateness announced in Burson.

The second step in the Burson analysis is to determine whether the state procedures allowed the plaintiff the opportunity to present evidence on each material issue.

Due process requires that the plaintiff have a reasonable opportunity to present his claim, including a reasonable time within which to present it. Armstrong v. Manzo, supra, 380 U.S. 545, was clear.

> A fundamental requirement of due process is "the opportunity to be heard." It is an opportunity which must be granted at a meaningful time and in a meaningful manner.
>
> 380 U.S. at 552. (Emphasis added.)

In Armstrong, the petitioner was notified of the pendency of the action only after the judgment had been entered. The Supreme Court struck the late notice saying that it was too late to be at a "meaningful time" in the proceedings.

A hearing at a "meaningful time" is a hearing in which the parties have adequate notice and sufficient time to prepare, attend, and present their hearing. Under Armstrong a party may not be denied an opportunity to present evidence until after his rights have been altered. Indeed, in Armstrong v. Manzo the petitioner was at least allowed an opportunity to challenge the change in his rights; in the present case Hargrove received no such opportunity, the time-bar was irrevocable.

J. W. Hargrove was barred even before he was injured. The Burson court declared that the proposition that the claimant be given a reasonable opportunity to present evidence on each material element of the claim "hardly seems to need explication." A fortiorari, the denial to Hargrove of any right at all to present any evidence is indubitably a denial of the right to a hearing granted by the due process clause.

C. This Court Has Long Held that Due Process Requires Reasonable Limitation Periods.

We have shown the development of the opportunity corollary in the context of recent Supreme Court decisions. While only one aspect of the right to an opportunity for a fair hearing is the problem of excessively short limitation period, it has long been firmly established that unreasonably short limitation periods are contrary to due process of law. For example, in Terry v. Anderson, 95 U.S. 628 (1877), the Supreme Court approved a limitation statute barring civil war claims but only because "a reasonable time is given ... before the bar takes effect.". 95 U.S. at 633.

In In re Brown, 135 U.S. 662, 701, 708 (1890) this Court refused to allow Virginia to place a one-year limitation on the enforcement of certain bonds issued by that state because the bondholders were widely scattered and many of them would not receive notice of the limitation in time to make arrangements to bring the action.

See also Lamb v. Powder River Live Stock Co., 134 F. 434, 439 (8th Cir. 1904) ("A reasonable time ... must be of sufficient duration to afford full opportunity for resort to the courts for the enforcement of the rights upon which the limitation is intended to operate.").

D. Because Jackson's limitation is so short [redacted] it denies a reasonable opportunity to be heard, it is a denial of due process.

J. W. Hargrove is entitled to a reversal of the judgment below. In Mullane v. Hanover Bank, supra, 339 U.S. 306; Armstrong v. Manzo, supra, 380 U.S. 545; Boddie v. Connecticut, supra, 401 U.S. 371; and Bell v. Burson, supra, 402 U.S. 535, the federal Supreme Court has made manifestly clear its firm intention to require unfaltering adherence to the opportunity-for-hearing corollary. Every person is entitled to a reasonable opportunity for a hearing on a material issue. An analysis of state law shows that the issues material to Hargrove's claims are the same after the limitation ran as before, but because of the Jackson rule, Hargrove was never given a reasonable opportunity to present these claims. The most rudimen-

tary concepts of due process demand such an opportunity to be given Hargrove.

III. THE JACKSON RULE DISTINGUISHES BETWEEN THOSE PERSONS ENTITLED TO THE FUNDAMENTAL CONSTITUTIONAL INTEREST OF ACCESS TO THE COURTS WITHOUT BEING JUSTIFIED BY A COMPELLING STATE INTEREST; HENCE IT DENIES EQUAL PROTECTION OF THE LAWS.

Judicial review under the equal protection clause is made in two levels: At a minimum the clause requires that every classification have a reasonable relation to the objectives of the classification. But beyond this minimum requirement, a state's classification limiting the exercise of constitutional rights, such as the right of access to the courts, may be justified only if there is a countervailing "compelling governmental interest" requiring such classification.

Because the plaintiff is denied access to the courts, certainly a fundamental constitutional right, while others similarly situated are allowed to sue, and because there is no compelling governmental interest to justify such a distinction, the use of the statute of limitations to bar them from access to the courts for their personal injuries is a denial to them of equal protection of the laws.

A. Equal Protection Clause Requires a Compelling State Interest to Justify Discrimination Against the Exercise of a Fundamental Constitutional Interest.

The Jackson rule completely excludes the plaintiffs from the courts of Tennessee without any compelling governmental

interest. Because access to the courts is a constitutional right, a mere showing of rational relationship between the classification and its objectives is insufficient. A "compelling governmental interest" is necessary to surmount the requirements of the equal protection clause.

Under Jackson the class of plaintiffs who in dealing with a product manage not to be injured until the product is one year old is completely barred from access to the courts. On the other hand, those plaintiffs who do not avoid injury for such a period are allowed to maintain an action. This differentiation, which is made without the justification of a compelling interest, is impermissible under the equal protection clause.

The "compelling interest" test was clearly stated in Shapiro v. Thompson, 394 U.S. 618 (1969). In that case the Supreme Court reviewed the constitutionality of Connecticut's one-year residency requirement imposed as a prerequisite to welfare payments. Finding that such a requirement penalized the constitutional right to free travel, the Court refused to listen to the state's argument that the requirement was reasonably related to proper state interest. A more stringent requirement was imposed by the Court to justify any classification imposing upon constitutional rights.

> [A]ppellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right unless shown to be necessary to promote a compelling governmental interest is unconstitutional.

394 U.S. at 634 (Emphasis in

Since access to the courts is indisputably a constitutional right, any limitation upon that right imposed upon any class of plaintiffs violates the equal protection clause unless justified by a compelling state interest.

B. Access to the Courts is Indubitably a Fundamental Constitutional Right Entitled to the Maximum Protection of the Equal Protection Clause.

Indeed, the most fundamental of constitutional rights is access to the courts. Without such access other rights, constitutional or nonconstitutional, are unenforceable. In Truax v. Corrigan, 257 U.S. 312 (1921) the Supreme Court struck down an exception to the general Arizona injunction statute prohibiting the injunctions for labor disputes. The Court held that the equality provision of the fourteenth amendment required equality of access to the courts.

> [T]hey should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts ...
>
> 257 U.S. at 335. (Original in italics.)

In Missouri v. Lewis, 101 U.S. 22 (1880) the federal Supreme Court, while approving territorial differences in judicial procedure, did so only with the express proviso that the access to the courts be denied to none.

> The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions, have an equal right

> in like cases, and under like circumstances, to resort to them for redress.
>
> 101 U.S. at 30.

Because the present plaintiff has been denied equal access to the courts for the redress of his wrongs, without the justification of any "compelling governmental interest," he has been denied equal protection.

The Jackson rule is simply a procedural exclusion of the plaintiffs from the courts of Tennessee, not based on any substantive state law. The Jackson time-bar of 28-314 in no way restricts the plaintiff's right of action if he can find a forum in which to assert such action; Jackson only bars the remedy in the Tennessee courts, not the right. Tennessee clearly recognizes the plaintiff's right of action as independent from the general personal-injury limitation, TENN. CODE ANN. § 28-304. Because section 28-304 is a part of the state's general statute of limitations, it bars only the remedy and not the plaintiff's right of action. The limitations defense does not substantively affect the plaintiff's right to bring the present action or limit the defendants' liability; it simply closes the doors of courts of the State of Tennessee to the assertion of the action. Thus it is clear that Tennessee's use of the Jackson limitation is in no way a refusal of the state to recognize the plaintiff's right of action for substantive reasons. It is simply the blatant denial to the plaintiff of the constitutional right of access to the courts.

C. Tennessee Has No Compelling Interest in Its Differentiation Among Those Entitled to Sue.

Of course Tennessee has no "compelling governmental interest" to justify the denial of access to its courts to the present plaintiff. Indeed so compelling is the state interest requiring this holding that in the overwhelming majority of jurisdictions the statute of limitations runs from the date of injury in product liability cases, at least insofar as the negligence counts are concerned.

This is not to argue that statutes of limitation are unconstitutional because they by definition do distinguish between those allowed access to the court and those not allowed such access. The ordinary limitation provision is, however justified by compelling state interests: The state interest in avoiding state claims for which the evidence and the witnesses' memories of the incident have faded with time, and the state interest in promoting expedition in the disposition of disputes. Moreover, such limitation bars are avoidable by prompt filing.

While a state's governmental interest in ending litigation and preventing state claims may justify imposition of the ordinary and typical limitation requirements upon the plaintiff, the only discernable state interest in applying the Jackson rule is fairness to the defendant in allowing him to write off indefinite future liabilities for products after they are sold. This interest, however, can certainly not be

regarded as a "compelling governmental interest."

First. As we have seen, almost all other states use the injury rule and there is no allegation that the interest sought to be gained by Tennessee in the Jackson classification is unique to this state.

Second. In practice the Tennessee limitation does not even provide product write-offs for three reasons: (1) It only applies to products sold in the hiatus between Jackson and the legislature's immediate amendment. (2) Even for those products it provides no protection against out-of-state claims. (3) Under TENN. CODE ANN. § 28-107 Tennessee delays commencement of the limitation period in products liability actions brought by minors until the plaintiff achieves his majority. Rives v. International Oil Burner Corp., 298 F. Supp. 1146 (E.D. Tenn. 1969).

Third. With the exception of the Jackson line of cases, Tennessee has evinced no compulsion to adopt a time-of-sale rule: Both the pre-Jackson Tennessee law and the post-amendment limitations rule utilize the time-of-injury principle in commencing the limitation provision contrary to the Jackson rule. Because the Jackson principle is not a "compelling governmental interest," Tennessee cannot deny the plaintiff access to its courts without denying him equal protection of the law.

IV. THE NATURE OF THE CASE AND THE DECISIONS OF THIS COURT BRING THIS CASE WITHIN SECTION 1257(2).

Section 1257(2) provides the basis of this Court's jurisdiction in this appeal. It provides that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Gourt as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> Judicial Code § 1257(2).

Since the appellant raised constitutional objections to the use of the statute of limitations, TENN. CODE ANN. § 28-304, by the state court below but the limitation was applied over this objection, the only question concurring the applicability of section 1257(2) is whether Hargrove's constitutional challenge was directed at the "validity" of the state statute.

This question of whether the validity of the statute was attacked is brought about by the fact that the appellant does not challenge the general validity of TENN. CODE ANN. § 28-304. He only challenges the construction given that statute by the Tennessee Court in products liability cases. Such a challenge to a statute's application is sufficient, however, to bring the case within the ambit of section 1257(2).

In Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) this Court sustained an appeal even though the state

question. In their discretion they declined to do so.

statute complained was only challenged insofar as it burdened interstate commerce. The Dahnke doctrine is still viable today, having been applied in Marcus v. Search Warrants, 367 U.S. 717, 721 (1961) and Cohen v. California, 91 S.Ct. 1780, 1784 (1971).

Even though it is directed to the validity of T.C.A. § 28-304 only as applied to a class of cases and not its general validity, the present challenge to the state statute is not focused upon the weighing of evidence or the exercise of discretionary authority under the statute. Hence Lerner v. Casey, 357 U.S. 468 (1958) and Zucht v. King, 260 U.S. 174 (1922) do not apply. Because the state statute's application is entirely mechanical, the Dahnke doctrine affords review here on appeal.

V. REVIEW IN THIS COURT IS NOT PRECLUDED BY THE STATE PROCEDURAL GROUND.

The Tennessee Court relied on its rule 14(4) to dismiss the appellant's constitutional contentions. This discretionary rule provides that the state Supreme Court will not consider errors not presented at the trial level.

Because the application of that rule to the present case was novel, because its application in the present case was not justified, and because the rule is discretionary, it does not provide an adequate state ground for the judgment below. Because the present case went up on a demurrer without a trial and the pleadings properly presented the issues, rule 14(4) had no applicability. No Tennessee decision

has been found applying rule 14(4) of the state Supreme Court, or its analogue, rule 12(4) of the state Court of Appeals, on a demurrer or, more generally, to limit the theories presented to the appellate court on a well-developed factual record. Indeed, in Poss v. Dixie Sand & Gravel Co., 458 S.W.2d 625, 627 (Tenn. App. 1970), cert. denied, the Tennessee appellate court allowed appellate objection to trial court's jury charge given without exception. Such novelty in procedural requirement will not preclude review here. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). Indeed, a procedural rule which limits the theories which may be presented in the appellate courts even though the factual record is sufficiently developed to clearly present to such courts the issue, is a procedure without a justifying state interest. Under Henry v. Mississippi, 379 U.S. 443 (1965) such a rule cannot be a state ground adequate to preclude review here.

But the most obvious reason that the procedural state ground is inadequate is that it was a discretionary rule. In Sullivan v. Little Hunting Park, Inc., 396 U.S. 299 (1969), this Court refused to allow a discretionary procedural state ground to preclude review of federal questions in this Court.

> [The Virginia] decisions do not enable us to say that the Virginia court has so consistently applied its notice requirement as to amount to a self-denial of the power to entertain the federal claim here presented if the Supreme Court of Appeals desires to do so. See Henry v. Mississippi, 379 U.S. 443, [illegible], 85 S.Ct. [illegible], 571-573, 13 L.Ed.2d 408 (Black, J., dissenting). Such a rule, more properly deemed discretionary than

here by certiorari.

396 U.S. at 235.

Although Sullivan involved review on a writ of certiorari and the present case is an appeal, any distinction in the adequate state ground rule on certiorari and the rule on appeal is artificial and should be avoided.

The Tennessee procedural rule used below has long been recognized as completely discretionary insofar as constitutional questions are concerned. In Frazier v. Elmore, 180 Tenn. 232, 173 S.W.2d 563 (1943) the Tennessee Court said that:

> while it is true that the rules of this Court provide that all questions ... shall have been raised in the trial Court and relied on in the assignments of error, this limitation is not binding on this Court ... where the constitutionality of statutes is involved.
>
> 180 Tenn. at 242, 173 S.W.2d at 566.

The state court then went on to say that appellate courts have "broad discretionary powers" in dealing with such matters of practice." See also Langford v. Vanderbilt Univ., 199 Tenn. 389, 404, 287 S.W.2d 32 (1956). Thus it is clear that the use of rule 14(4) to dispose of a constitutional issue was discretionary.

Under Sullivan v. Little Hunting Park, supra, 396 U.S. 229, a discretionary state rule of procedure cannot be an adequate state ground to preclude review in the federal Supreme Court.

For substantial policy reasons grounded deeply in the federal nature of our system and the appellate jurisdiction of this Court, the presentation of federal questions to state courts has long been required as a prerequisite to review here. Cardinale v. Louisiana, 394 U.S. 437 (1969). Of course such questions must be raised in such a fashion that the state courts can consider the questions. Parker v. Illinois, 333 U.S. 571 (1948)

Under such considerations, it has been stated broadly that this Court will not consider questions not presented until rehearing. If under settled state procedure such delay precluded judicial review, these statements are correct. Compare Parker v. North Carolina, 397 U.S. 790, 798-99 (1970). But if the state court exercised discretion in refusing to hear the federal question, the issue may be reached on appeal.

In Williams v. Georgia, 349 U.S. 375, 382-83 (1955) this Court made the distinction clear.

> A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. The principle is clear enough. ... Thus, we would have a different question from that before us if the trial court had no power to consider Williams' constitutional objection at the belated time he raised it. But, where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and

> deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right.
>
> 349 U.S. at 382-83.

The Court then noted that while such motions were "not favored," they could grant relief in "'exceptional' or 'extraordinary' cases"; thus the state court had discretion in the refusal of the federal claims. See also Sullivan v. Little Hunting Park, Inc., supra, 396 U.S. 229. See generally Annot, Noncompliance with State Procedural Rule as Constituting "Adequate State Ground" for Denial of Relief so as to Preclude Supreme Court Review of Federal Questions, 24 L. Ed. 2d 837, 845-49 (1970).

The Tennessee rehearing procedure is strikingly similar to that of Georgia in the Williams case. Certainly new issues can be raised at that stage; rule 32, ¶ 2 of the Tennessee Supreme Court specifies that the rehearing petition will be refused "where no new argument is made, and no new authority adduced." An example of the practice under this rule is found in Knox v. Batson, 217 Tenn. 620, 399 S.W.2d 765 (1966). In that case the Tennessee Supreme Court said that the rehearing petition should be used only if "some new and decisive authority has been discovered which was overlooked by this Court." 217 Tenn. at 641, 399 S.W.2d at 775. The state high court then discussed and distinguished the only new authority cited. Thus it is clear that the procedural rules and established practice of the Tennessee courts allowed consideration of the federal

Such discretion by the state court is not sufficient to preclude review here. Sullivan v. Little Hunting Park, Inc., supra, 396 U.S. 229, and Williams v. Georgia, supra, 349 U.S. 375. The Sullivan-Williams rule is consistent with the fundamental precepts of federalism and with the appellate function of the Court.

PART THREE: THE QUESTIONS REQUIRE PLENARY CONSIDERATION

The federal questions are not only substantial in the sense of Zucht v. King, supra, 260 U.S. 174; they are also substantial in the sense that they are important, so important that they require plenary consideration by this Court. Their importance stems from these significant areas: the broad principles involved, the precedent necessary to prevent injustice, and the present plaintiff's right to fair dealing in the presentation of his claim to the courts.

In the first place they are important because they involve the application of broad fundamental principles in the context of products liability cases, an expanding field of litigation. The fundamental principle involved is the right of access to the courts. As we have seen, there is no doubt as to the fundamental nature of the right of access to the courts. This Court has unfalteringly adhered to its holdings that due process requires a hearing on all material issues before a party's rights can be altered. Bell v. Burson, supra, 402 U.S. 535; Mullane v. Hanover Bank, supra,

339 U.S. 305; Armstrong v. Manzo, supra, 380 U.S. 545. Indeed the federal questions here presented are important in that the answer to these questions will reiterate in modern context the constitutional requirement of reasonable limitation periods found in Terry v. Anderson, supra, 95 U.S. 628; In re Brown, supra, 135 U.S. 701, and other older decisions of this Court, but which, while apparently still accepted by the Court, have not been reiterated in recent years.

The federal questions are important because they analyze the right of access to the Courts and the requirement of reasonable limitation periods in products liability cases, an area of the law which gains significance continually in our increasingly consumer-oriented society. Every state has now accepted the principle that manufacturers are liable in negligence regardless of privity and with the recent advent of RESTATEMENT (SECOND) OF TORTS § 402A (1966) and the abolition of warranty's privity requirement, the number of cases is continually increasing. Because the federal question involved here involves the right of access to the courts in such actions, they are extremely important.

The second area of importance in the federal questions here presented stems from the necessity of establishing a federal precedent to overrule the rule of Jackson v. General Motors, supra, 441 S.W.2d 482 which is being given such sway in Tennessee. Even though the legislature attempted to reverse Jackson, Tenn. Acts 1969, ch. 293, the Tennessee problem is apparently permanent for several reasons: First, the amendment applied

only to personal injuries, not property damage. Secondly, Flynn v. Camp, supra, 470 S.W.2d 347 applies the Jackson rule to post-amendment accidents caused by products sold prior to the amendment. And finally, the amendment may be invalid; one state court has held the anti-Jackson amendment is unconstitutional. Dobbins v. Terrazo Mach. & Supply Co., No. B-7122 (Davidson County Cir. Ct., Oct. 21, 1971). Furthermore, the Tennessee courts regard this Court alone as binding authority on federal questions, Brown v. State, 466 S.W.2d 527, 528 (Tenn. Crim. App. 1971); so this Court alone can establish a binding precedent. Thus, in addition to the broad policy reasons for the importance of the federal questions, Tennessee desperately needs the establishment of a federal precedent in this area.

The final reason for the importance of the federal questions here presented is the necessity of doing justice in the case at bar. As we noted in Part One, applying the limitation stated to Mr. Hargrove is indeed a denial to him of due process and equal protection. His right, as an individual litigant, to be given justice in his case is a matter of importance which also mandates plenary consideration of the present case.

Because of the necessity of justice in the present case, the need for a precedent for the Tennessee courts, and the significance of the broad policy issues involved, the federal questions are so important and substantial that they require plenary consideration by this Court.

CONCLUSION

For all the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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Appendix

FOR PUBLICATION

JUNE 7, 1971

J. W. HARGROVE,

Appellant

v.

W. L. NEWSOME, dba, MATERIALS HANDLING SERVICES and KELLEY COMPANY, INC.

Appellees

Davidson Law

Honorable Roy A. Miles, Judge

FILED
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SUPREME COURT

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OPINION

This case comes to this Court from the action of the trial judge in sustaining demurrers filed in answer to the declaration, dismissing the suit. In this opinion the parties will be referred to as they appeared in the trial court: that is, J. W. Hargrove, as plaintiff, and W. L. Newsome, dba, Materials Handling Services, and Kelley Company, Inc., as defendants, or by name.

Appendix

Plaintiff is an employee of the Schrader Division of Scoville Manufacturing Company. On July 8, 1966, Schrader purchased a mechanical dock from the defendant Newsome, which dock was manufactured by the defendant Kelley. On September 22, 1967, plaintiff, while acting in the course of his employment with Schrader, was seriously injured due to an alleged malfunction of the mechanical dock. This suit was filed on September 16, 1968 against both defendants on the theory of (1) common law negligence, (2) express and implied warranty, and (3) strict liability sounding in tort.

The negligence and strict liability counts were dismissed as being barred by the one-year statute of limitations under T.C.A.§28-304 in effect prior to its amendment by Chapter 239, Public Acts of 1969. The warranty counts were dismissed for lack of privity of contract.

At this point we would like to express our appreciation for the help afforded this Court by the excellent briefs filed by counsel for all parties.

Counsel for plaintiff frankly and candidly admits under previous decisions of this Court the trial judge was correct in sustaining the demurrers. The thrust of the argument here is that the requirement of privity of contract in warranty actions is neither justified by past authority or by any public policy argument.

We agree as plaintiff argues the courts of several states feeling a need for a more satisfactory remedy in products liability cases for consumers injured by defective products to obtain redress generally against remote manufacturers accomplished this end by abolishing the requirement of privity of contract in warranty actions. In view of the Uniform Sales Act adopted in most jurisdictions various expedients have been used to circumvent the requirement of privity of contract; among them (1) the theory of third-party beneficiary contract, (2) agency theory, and (3) warranty running with the goods similar to a covenant running with the land. These methods and others have been praised by some writers and condemned by others. Be that as it may, it is not necessary for the decision in the case at bar for us to discuss the merits of these methods.

On this issue plaintiff cites as the landmark case Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960). In view of the more recent New Jersey cases of Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), and Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965), it is likely true as stated in an article in Rutgers Law Review, Vol. 19, p. 693, that in New Jersey "privity has no vitality." In reading these three New Jersey cases it is difficult to determine whether they were decided upon the principle of strict liability in tort or upon the theory of implied warranty. Although the Uniform Sales Act and the more recent Uniform Commercial Code were both adopted

in New Jersey, the Uniform Commercial Code being effective January 1, 1963, these cases on the issue of privity give scant consideration to these statutes. These three cases and the Uniform Commercial Code are discussed in the above mentioned Rutgers Law Review.

On the theory plaintiff argues, particularly on the public policy argument, the case of Chapman v. Brown, 198 F.Supp. 78 (1961), affirmed 304 F.2d 149 (1962), is well reasoned. This case deals directly with the issue of privity and its relation to the Uniform Sales Act in a products liability case.

We have considered all the authority cited by plaintiff giving the reasons for the need of now abolishing privity of contract in warranty actions. Under the view we take of the matter it is not necessary to again list or discuss these reasons.

In products liability cases this Court has consistently required privity of contract in warranty actions. Kyker v. General Motors Corp., 214 Tenn. 521, 381 S.W.2d 884 (1964); Olney v. Beaman Bottling Co., 220 Tenn. 459, 418 S.W.2d 430 (1967). The reasons and authority therefor are stated in these opinions. Plaintiff does cite the recent case of Layman v. Keller Ladders, Inc. ___ Tenn. ___, 455 S.W.2d 594 (1970), to support a statement that "In this case (Layman) this Court hinted that it recognized the need for abolishing vertical privity requirements at least among

members of the distributive chain." The only issue in Layman was the statute of limitations applicable to the facts of the case. Layman does not modify the holdings in Kyker and Olney.

We might well be persuaded by the arguments based on public policy in regard to the need for dispensing with the requirement of privity in warranty actions, except for one reason we consider controlling. Plaintiff had a remedy under either his count on negligence or under the count on strict liability in tort. The fact plaintiff under both these counts is unfortunately barred by a statute of limitations is not material to our decision since all civil actions are sooner or later barred by a statute of limitations.

It is next argued under the Uniform Commercial Code adopted in this state and made effective July 1, 1964, by enactment of Chapter 81, Public Acts of 1963, this Court should reconsider the requirement of privity in warranty actions. The events giving rise to Kyker v. General Motors, supra, and Olney v. Beaman, supra, occurred prior to adoption in this state of the Uniform Commercial Code and the point raised here in reference to this Code is of first impression in this State. The section of the Uniform Commercial Code pertinent to this issue is T.C.A.§47-2-318, which reads as follows:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or

> who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

The effect of this statute is to abolish the requirement of privity of contract for personal injuries received under certain circumstances as to a member of the buyer's family, his household or a guest in his home in warranty actions brought against the buyer's immediate vendor. To this extent this statute changes the law in this state. The argument here is that this legislative change in our law should be extended to include all persons foreseeably affected by the products' defects, it being admitted plaintiff does not fall into any of the listed categories

The Uniform Commercial Code was written under the direction of the Permanent Editorial Board and recommended to the legislatures of the various states for passage on the ground it would make the law uniform in all states regarding commercial transactions covered by the Code. The value of the Code depends to a large measure on its uniformity, particularly as to the judicial construction courts give to the language used. This should inhibit courts from either extending or contracting the language used, particularly where the language as in T.C.A. §47-2-318, on the issue here, is clear containing no ambiguities.

During the time this Code was being written the issue of privity of contract in products liability cases was being discussed pro and con in opinions by a number of courts and also by various other legal scholars. In the preparation of Section 2-318 the issue of privity was considered. One version of this section (generally referred to as the Virginia-Wyoming version) which abolished privity of contract was considered by the Permanent Editorial Board and rejected. The legislatures of a number of states in adopting the Uniform Commercial Code modified Section 2-318, which modifications generally went further in abolishing the requirement of privity of contract than does Section 2-318 as recommended by the Permanent Editorial Board. We consider these facts pertinent since the Tennessee Legislature chose to adopt the version of Section 2-318 recommended by the Permanent Editorial Board.

In consideration of this matter we conclusively presume the Legislature at the time of its enactment of the Uniform Commercial Code had knowledge that under the law of this state privity of contract was required in warranty actions involving products liability cases. Further, the Legislature with this knowledge enacted T.C.A.§47-2-318, which does change the law as to privity of contract in warranty actions, but also clearly delineates the extent of the change. Under these circumstances to extend to any person not within the categories mentioned in the statute the right to bring an action upon warranty without privity of contract would, in effect, be

amending the statute under the guise of judicial construction.

This we should not do.

The judgment of the lower court is affirmed.

ROSS W. DYER,
Chief Justice

Chattin, Creson,
Humphreys, and
McCanless, JJ.
concur

After the above opinion had been prepared, considered and approved by the Court, plaintiff filed a supplemental brief directed to the counts of common law negligence and strict liability sounding in tort. Reply briefs have been filed and we have again considered the case as to these two counts.

The negligence and strict liability counts were dismissed on authority of Jackson v. General Motors Corporation, ___ Tenn. ___, 441 S.W.2d 482 (1969). In the supplemental brief plaintiff cites three recent cases arising out of the United States District Courts in Tennessee to support an argument that under the facts of the case at bar Jackson v. General Motors Corporation, supra, is not applicable. We have carefully considered the federal cases cited and are of the opinion Jackson v. General Motors Corporation, supra, is applicable to the case at bar. In Jackson v. General Motors Corporation, supra, we held the applicable statute, T.C.A. §28-304, (prior to amendment) commences to run at the date of the wrongful act or omission whether the damages occasioned were on the same date or later. In the case at bar the wrongful act or omission was occasioned on the date of the sale (July 8, 1966), and suit was not filed within one year from that date.

The Court was at the time of its consideration of Jackson v. General Motors Corporation, supra, and is now, fully aware that the decision in Jackson could and very likely would cause hardships in certain cases. The decision in Jackson was controlled by the decision in Albert v. Sherman, 167 Tenn. 133,

67 S.W.2d 140 (1934), and in both of these cases the Court was careful to point out the fact such hardships could result. Even so, during the thirty-four year period between Albert to Jackson the Legislature did not see fit to change the language of the statute at issue. Since Jackson, the Legislature has seen fit to make material changes in the statute.

Plaintiff also cites a recent opinion by the Court of Appeals styled Harts v. Tennessee Liquified Gas Corporation. This case is now in the appellate procedure and we do not deem it proper to comment on same at this time.

The judgment is affirmed.

ROSS W. DYER,
Chief Justice

SUPREME COURT, NASHVILLE

J. W. HARGROVE

Vs.

W. L. NEWSOME, d/b/a MATERIALS HANDLING SERVICES AND KELLEY CO., INC.

Davidson Law

Affirmed

This cause coming on to be heard upon a transcript of the record from the Circuit Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the judgment of the Court below there is no reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and adjudged by this Court that the judgment of the Court below be affirmed and that the demurrers be sustained and the case dismissed.

All costs of the cause will be paid by J. W. Hargrove, for which let execution issue. 6/7/71.

J. W. HARGROVE,

Appellant

v.

W. L. NEWSOME, dba, MATERIALS HANDLING SERVICES and KELLEY COMPANY, INC.,

Appellees

Davidson Law

Honorable Roy A. Miles, Judge

OPINION ON PETITION TO REHEAR

Appellant, J. W. Hargrove, designated in the original opinion as plaintiff, has filed a courteous petition to rehear raising issues not litigated in the trial court. Under Rule 14(4), of this Court, issues not raised at the trial level cannot be litigated upon appeal.

The petition to rehear is denied.

ROSS W. DYER,
Chief Justice

Chattin, Creson, Humphreys, and McCanless, JJ. concur

J. W. HARGROVE

VS.

W. L. NEWSOME, d/b/a MATERIALS HANDLING SERVICES AND KELLEY CO., INC.

Davidson Law

Petition to Rehear Denied.

This cause coming on further to be heard on a petition to rehear and reply thereto, upon consideration of all of which and the Court finding no merit in the petition, it is denied at the cost of petitioner. 9/7/71.

OFFICE OF THE CLERK FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE.

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the order denying petition to rehear of said Court, pronounced at its DECEMBER Term, 19 71, in the case of

J. W. HARGROVE

VS.

W. L. NEWSOME, d/b/a. etc., et al

as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Supreme Court Building at Nashville, on this, the 11TH day of NOVEMBER, 19 71.

Ramsey Leathers, Clerk

By _____, Deputy Clerk